In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4679

OLYMPIA CANNING COMPANY, a corporation,
Plaintiff in Error.

vs.

THE UNION MARINE INSURANCE COMPANY, LTD., a corporation,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Reply Brief for Plaintiff in Error

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I.

It is first contended in the brief of the defendant in error that the trial court found, as a fact, that the foundering of the vessel involved in this case was not caused by a peril of the sea, and that this finding is conclusive on this court under Section

649, United States Revised Statutes. Whether a given state of facts constitutes a peril of the sea or other peril within the terms of a policy of insurance is obviously a question of law and not of fact. The court in this case found that the vessel was seaworthy, properly loaded, and had competent officers and crew, at the time she started on her voyage from Olympia, at which time the policy attached; that upon arrival at Tacoma, an intermediate port, the master took on additional cargo so that she was then so heavily loaded "that at her port she had only about six inches freeboard, which was the maximum she could be put down with safety"; that she backed out from her dock in the waterway at Tacoma without any indication of tenderness or topheaviness, although subjected to the displacement waves of a passing vessel, and proceeded a distance of about two and one-half miles, when she encountered certain tide rips and cross currents, changing her course at the same time; that she capsized before getting out of these tide rips and cross currents; that the "listing, capsizing and sinking of the vessel was caused by her being so topheavy, unstable, tender and unfit condition, due to the improper manner in which the cargo taken on at Tacoma was stowed aboard her, as to

be unable to withstand the effect of said tidal or cross currents, and was not caused by perils of the seas or any other perils or risks covered by the contract."

It is manifest that the last statement, to the effect that the foundering of the ship was not caused by perils of the sea, is a conclusion, and not a finding of fact within the meaning of the statute referred to. The sole question involved in the *Sassoon* case, cited by defendant in error, and in *Dixon v. Sadler* and other cases cited in our original brief, was whether the ascertained facts causing the loss constituted, in law, perils of the sea within the meaning of the policy. Construction of a contract is always a question of law for the court. It seems to us too plain for argument that it is for this Court to determine, as a matter of law, whether the facts found to exist by the trial judge, as stated in his findings of fact, constitute in law such a peril as falls within the policy.

Such was the express holding of Lord Penzance in *Dudgeon v. Pembroke*, cited by this court in *Aetna Insurance Co. v. Sacramento & Stockton S. S. Co.*, 273 Fed. at page 60.

II.

The defendant in error also questions our contention that the construction of the policy in this case, as regards implied warranty of seaworthiness, is to be governed by the law and practice of England. The language of the policy in that respect is, we believe, identical with that used in the policy involved in the case of *Aetna Insurance Co. v. Sacramento & Stockton S. S. Co.*, 273 Fed. 55, wherein this Court proceeded to determine liability under the policy in accordance with its understanding of the laws of England. It is true that in the instant case the laws of England are not pleaded. But, while that fact is mentioned by the defendant in error in its brief, we understand that it is not insisted upon. On the contrary, the brief states:

"The defendant, however, does not desire to seek escape from its policy on any such technicality; and if the court should hold that the provision in the policy that the adjustment and settlement of claims shall be made 'in conformity with the laws and customs of England' makes English law applicable on the question of liability under the policy, we are willing to have the court determine the English law from its own reading of the books."

If, however, the Court should think there is any doubt about the provision in the policy making the question of implied warranty thereunder one to be governed by the English law, then it would follow that the law of the State of Washington, where the policy was issued, would govern. Section 7175 of Remington's Compiled Statutes of Washington provides: "An implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk," except in time policies when the ship must be seaworthy at the commencement of each voyage thereunder, and except in insurance on cargo which is intended to be transhipped at an intermediate port, in which case each vessel upon which the cargo is shipped or transhipped must be seaworthy at the commencement of its particular voyage.

III.

Defendant strenuously contends that the facts found by the court below to have caused the sinking of the vessel, and the consequent loss of the assured's cargo, do not constitute a peril of the sea or other peril covered by the policy; and that of course is the one question involved in the case.

It may be that when a vessel founders solely as the result of the decayed and rotten condition she was in at the time the policy attached, without any stress of weather or mismanagement or errors in navigation, or other external agency or force affecting her condition after the voyage commenced, the sinking would not be regarded as the result of a peril of the sea; but we contend that where a vessel is seaworthy, properly manned and equipped, at the time she commences her voyage and when the policy attaches, and some unexpected and unforeseen event occurs thereafter during the course of the voyage, which changed her condition, and which event in conjunction with the action of the sea, whether calm or tempestuous, causes the vessel to founder, the loss is attributable to a peril of the sea within the meaning of the insurance policies. There is nothing in *Sassoon & Co. v. Western Insurance Co.*, 12 Asp. Mar. Cas. 206, cited by defendant in error, which holds to the contrary. In that case, at the time the policy attached the vessel was lying in port in a decayed and rotten condition, and in the course of a short time, without any accident of any kind and without any change in her condition by reasons other than ordinary wear and tear, water entered her hold through leaks in rotten planks and destroyed the cargo.

Without attempting any general or all-inclusive definition of the phrase, "perils of the sea," it is clear that it includes the co-existence as operating forces or causes of two essential conditions. First, it must be a marine loss—the damage must directly from the sea. This condition is admittedly present in this case. The plaintiff's goods were lost by coming in contact with the water when cast into the sea. The water destroyed them. It was a marine loss—a loss by the sea. The second essential to a loss by a "peril of the sea," within the settled construction of that phrase is the presence in some form of the element of chance or the unexpected, commonly called "fortuitous" or "accidental"; and this element must be something occurring after the policy attached, and something that contributed to the loss. This second essential may be supplied by storms or tempestuous seas, or by hidden and unknown rocks or shallows. It may also consist of or result from the management or navigation of the vessel, including the trim of the ship or stowage of cargo at intermediate ports, after the policy attached. The question in this case is whether there was present this second essential—the "fortuitous" or "accidental" element—as a contributing factor to the loss.

In the *Sassoon* case, this element was lacking. The loss was the direct result of sea water entering the vessel and coming in contact with the insured goods, and was, therefore, a marine loss; but the intrusion of the water was the natural and certain result of the decayed condition of the vessel when the policy attached. Nothing occurred after the policy attached to change the condition of the vessel or bring about the loss except natural and inevitable wear and tear by the lapse of time. The essential element of chance or fortuity was absent; and therefore the loss was not within the policy.

The distinction we are seeking to emphasize is well stated by Lord Herschell in *Wilson v. Xantho*, 12 A. C. 503, as follows:

"There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. *The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.* It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by the common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils

of the sea. And a loss by foundering owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category."

In the above case, the House of Lords was dealing with a loss from foundering caused by collision attributable solely to negligent navigation and without any extraordinary violence of the winds or waves. In a previous case decided by the Queens Bench (*Woodley v. Mitchell*, 11 Q. B. D. 47), it had been held that a loss caused by collision attributable solely to negligent navigation of one or both vessels was not a loss by perils of the sea within the terms of that exception in a bill of lading. In overruling the Woodley case, the House of Lords in the *Xantho* case, clearly establishes the doctrine in the English courts that a loss within the term "peril of the sea" as used in the bill of lading need not necessarily be caused by any violence of the winds or waves, but may be caused by the intervention of human agencies such as the negligence of the vessel's crew. In that case, the principle is also clearly established that any accident or fortuitous circumstance occurring subsequent to the inception of the voyage and which was not an ordinary incident of such voyage whereby the ship or cargo is damaged by sea water is a loss

by peril of the sea. We have cited fully from this case on pages 27-30 of our opening brief. This principle has since been followed in all of the English cases.

In *Davidson v. Burnand*, L. R. 4 C. P. 117, the crew negligently left open sea cocks or valves through which water entered the ship and caused the loss. The loss was attributable solely to the negligent action of the master and crew in managing the vessel. When the sea cocks were negligently left open, at a time when their opening was below the water line, the sea water normally and naturally entered the hold of the ship. The only thing that could be regarded there as fortuitous and unexpected or accidental was the negligent action of the crew in leaving the sea cocks open. Neither storms, winds nor waves were contributing factors.

In a suit against the underwriters, the Court, by Brett, J., stated:

"* * * the water got in not by the happening of any ordinary occurrence in the ordinary course of a voyage, but by the accidental circumstance of some cock having been left open by the negligence of the crew. That is, in my opinion, sufficient to make the underwriter liable. The question is the same as it would have been if by the falling of a

mast through the vessel, or other negligent act of the crew, the vessel had sunk in deep water, and I think the loss sufficiently comes within the doctrine of one happening by a *vis major*, and is within the meaning of the policy a loss caused by the perils insured against."

In the case of *Frazer v. Pandorf*, decided by the House of Lords and reported in Vol. 12 App. Cas. 518, it appears that sea water entered a seaworthy ship solely by reason of a hole gnawed into one of the pipes by rats, and in holding that the loss was within the term "peril of the sea," Lord Halsbury, Lord Chancellor, states in his decision:

"My Lords, in this case the admissions made at the trial reduce the question to this: whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea water to come in and cause damage is a danger and accident of the sea. * * * One of the dangers which both parties to the contract would have in their mind would I think be the possibility of the water from the sea getting into the vessel, upon which the vessel was to sail in accomplishing her voyage; it would not necessarily be by storm, the parties had not so limited the language of the contract. It might be by striking on a rock or by excessive heat so as to open some of the upper timbers. These and many more contingencies that might be suggested would let the sea in, but what the parties I think contemplated was that any acci-

dent (not wear and tear or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract. A subtle analysis of all the events which led up to and in that sense caused a thing may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. * * * Now cases have been brought to your Lordships' attention in which the decision has turned, not, I think, upon the question of whether it was a *sea* peril or accident, but whether it was an accident at all. I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas.

One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case it was a danger, accident, or peril in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword-fish from without,—the sea water did get in."

And in the same case, Lord Bramwell states:

"What is the 'peril'? It is that the ship or goods will be lost or damaged; but it must be 'of the sea.' * * * In the present case the sea has damaged the goods. That it might do so was a peril that the ship encountered. It is true that rats made the hole through which the water got in, and if the question were whether rats making a hole was a peril of the sea, I should say certainly not. If we could suppose that no water got in, but that the assured sued the underwriter for the damage done to the pipe, I should say clearly that he could not recover. But I should equally say that the underwriters on goods would be liable for the damage shown in this case. * * *

An attempt was made to show that a peril of the sea meant a peril of what I feel inclined to call the sea's behavior or ill-condition. But that is met by the argument, that if so, striking on a sunken rock on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence."

And Lord Herschell, in the same case, stated:

"Taking the facts of this case to be as I have stated them, I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy, as due to a peril of the sea. It arose directly from the action of the sea. *It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage and therefore to be anticipated.*" (Italics ours).

In the recent case of *P. Samuel & Co. v. Dumas*, decided by the House of Lords in February, 1924, and reported in 29 English Commercial Cases p. 238, the court was dealing with the case of a Greek ship that had been grossly over-insured and scuttled upon the direct orders of the owners for the purpose of collecting the insurance. The majority of the court, by Viscount Cave and Viscount Finlay, held that the deliberate scuttling of the ship was the proximate cause of the loss and not a peril of the sea, the decision being based upon the grounds; first, that Section 5 (2) of the English Marine Insurance Act which provides,—

"The insurer is not liable for any loss attributable to the wilful misconduct of the assured"

would bar a recovery; and, second, that the scuttling of the ship, having been due to the wilful misconduct of the assured, there was no accident or fortuitous element involved.

"Then, was the loss a loss by peril of the seas? Surely not. The term 'peril of the seas' is defined in the First Schedule to the Act as referring only to 'fortuitous accidents or casualties of the seas.' The word 'accident' may be ambiguous * * * but the word 'fortuitous' which is at least as old as Thompson v. Hopper, involves an element of chance or ill luck which is absent where those in charge of a vessel deliberately throw her away."

And Viscount Finlay states:

"The loss was directly due to the wilful and deliberate act of the owner, and there was nothing of the accidental element which is essential to constitute a peril of the sea."

Lord Sumner, in a lengthy opinion, holds that the scuttling of the ship by the wilful act of the crew in compliance with the owner's orders, is nevertheless a peril of the sea, although the owner would be precluded from recovering because of his own wilful knowledge. This case clearly recognizes the principle for which we are contending.

The case of *Cohen v. National Benefit Association*, K. B. D., reported in 40 Times Reports 347, is very similar to the case at bar. The insured vessel was a submarine which was being dismantled. During the dismantling operations, openings were carelessly left through which the water leaked in, causing the submarine to sink. The underwriters defended on the ground that the loss was not caused by a peril of the sea, but was due to a lack of due care in the dismantling operations. The court (Bailhache, J.) found as a fact that the loss was due to negligence in dismantling and held,

"The unintentional admission of sea water into a ship whereby the ship was caused to sink was a peril of the sea."

The case of *Redman v. Wilson*, cited in our original brief (p. 30), is decided upon the same principle. There the vessel was seaworthy at the commencement of the risk, but at the intermediate port she was so unskillfully loaded that on commencing her voyage home she was unable to keep the sea, not because of a tempestuous condition of the sea, but because of the manner in which she had been loaded; and under those conditions she was intentionally and purposely run ashore to prevent her sinking in the river. The court held that her loss was due to a peril within the policy.

The principle underlies all collision cases where the insured vessel is solely at fault: When a ship is negligently navigated and as a result comes into collision with another ship, or runs against the shore, or against a pier, and as a result founders, the only fortuitous or unexpected element to be found is the negligence of the crew in their navigation of the vessel. If they negligently run the ship against a pier and open a hole through which water enters and she sinks, the sinking is due to

the faulty navigation, but the underwriter is liable on his policy.

In *Orient Ins. Co. v. Adams*, 123 U. S. 67, the only fortuitous circumstance contributing to the loss was the negligent act of the master in casting her loose from her moorings into the river current when she had no steam to enable her to withstand the force of the current. When the policy in that case attached, the risk that the master might negligently turn his boat into the river current when she had no steam was something that "might happen"; but after the boat was once cast into the current without steam, the drifting over the falls was an event that "*must* happen"—it was natural, normal, normal and inevitable.

When this vessel left Olympia on the voyage to Seattle, it was contemplated that she would or might stop at Tacoma and take on additional cargo. There was a possibility—not a certainty—that the master and crew, through bad judgment, negligence or carelessness, might so trim the ship when this additional cargo was placed on board as to make her tender and topheavy and unable to withstand the dangers incurred in passing through the tide rips and cross currents and other sea conditions to be encountered on the remainder of the

voyage. It was against such risks, among others, that indemnity was taken. The only precaution the owner could take against such a risk in advance or at the time of the commencement of the voyage, was to see that his vessel was seaworthy and placed in charge of competent officers and crew. The subsequent management and navigation of the vessel was necessarily left to the judgment of the master. Unless this risk is covered by a policy of this kind, the shipper of cargo is necessarily exposed to the danger of losses without any known method of securing protection against this risk. The owner of a vessel is not liable under the Harter Act for a loss of cargo due to fault or error in the management or navigation of the vessel; and if this Court should hold that the underwriter is equally exempt from liability where the loss is partly attributable to such fault or error, then the shipper is left to bear the risk alone.

In the case of *Waters v. The Merchants Louisville Ins. Co.*, 11 Pet. 218, the court, in discussing the general policy of holding underwriters liable for marine perils brought about by the negligence of the officers, states:

"If negligence of the master or crew, were under such circumstances a good defense, it would be

perfectly competent and proper to examine on the trial any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage, for all these might be remotely connected with the loss. If there had been more diligence, or less negligence, the peril might have been avoided, or escaped, or never encountered at all. Under such circumstances, the chance of a recovery upon a policy for any loss, from any peril insured against, would of itself be a risk of no inconsiderable hazard."

The loss in this case, however, is shown to be due, in part at least, to the unusual or abnormal action of the sea. The finding of the trial court was that the sinking of the vessel was caused by her being in such tender and unfit condition, owing to the manner in which the Tacoma cargo was trimmed in the vessel, as to be unable to withstand the effect of the tide rips or cross currents. That these tide rips and cross currents create a more or less abnormal and dangerous condition of the sea and imperil the navigation of small vessels of the size of the "Rubiayat" when fully loaded, and particularly when badly trimmed, is of course obvious to anyone. They might, and probably

would be, without material effect upon large vessels. That these cross currents and tide rips, acting upon this vessel when the master's unskillful trimming had rendered her topheavy and tender, caused the sinking, is the substance of the court's finding. The fact that she would have withstood the effect of these disturbed conditions of the sea if she had been properly trimmed, does not affect the result. The unskillful trimming was the unforeseen and unexpected act of the master during the voyage and after the policy attached.

That finding, in our opinion, brings the case squarely within the principle which decided the case of *Dixon v. Sadler*, cited in our original brief. In that case the master had removed the ship's ballast, thereby of course rendering her tender and topheavy. She struck rough weather or a squall, which she would have withstood successfully if she had proper ballast, but which she was unable to withstand in her then tender condition, and she foundered. The court held that the loss was within the terms of the policy. The principle there established is that if the vessel encounters sea conditions which she would successfully withstand if in a seaworthy state, but which she is unable to withstand owing to her then unseaworthy

condition caused by acts of the master after the voyage began, the loss is within the policy.

The damage to plaintiff's goods was caused by coming in contact with sea water; that was the proximate cause of the loss, and it was clearly a marine loss. If we go back of that last incident causing the loss, we find that the cause of the goods coming in contact with the sea water was the capsizing of the vessel, which in turn was caused by the effect of the tidal and river cross currents acting upon the vessel when topheavy and tender, and possibly to some extent to improvidence in changing her course; and this condition of the vessel was, in turn, caused by the negligent act of the master in improperly stowing the Tacoma cargo—events that were unforeseen and unexpected when the vessel sailed from Olympia and when the policy attached. We have here all of the essentials of a "peril of the sea," as that phrase is defined in the cases and commonly understood in shipping and mercantile circles. Defendant cites no case, and we have found none, which denies recovery for a loss caused by capsizing, foundering or stranding, when the casualty was attributable even to the normal action of the sea upon a vessel

rendered unfit to withstand such action by the negligent act of the master during the voyage and after the policy had attached.

Respectfully submitted,

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